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No. 86-1932

In The

Supreme Court of the United States

October Term, 1986

DARYL GATES, *et al.*,

Petitioners,

vs.

DOLORES LANGFORD, *et al.*,

Respondents.

BRIEF OF AMICUS CURIAE, LOS ANGELES POLICE PROTECTIVE LEAGUE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

STONE & HEALY
MICHAEL P. STONE
3435 Wilshire Boulevard
24th Floor
Los Angeles, California 90010
Counsel for *Amicus Curiae*,
LOS ANGELES POLICE
PROTECTIVE LEAGUE
(213) 382-5444

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964

TABLE OF CONTENTS

Page

INTRODUCTION 1

DISCUSSION 2

1. THE RULE REQUIRING JUDICIAL APPROVAL OF USE IN EXECUTING A SEARCH WARRANT OF INSTRUMENTALITIES DEEMED INHERENTLY DANGEROUS WILL HAVE AN ADVERSE EFFECT UPON LAW ENFORCEMENT 3

2. THE CALIFORNIA SUPREME COURT INTERPRETED THE FOURTH AMENDMENT IN A MANNER WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT 5

3. THE LANGFORD DECISION IMPROPERLY EQUATES CONSTITUTIONAL PRINCIPLES GOVERNING PERSONAL SEARCHES TO THOSE GOVERNING HOUSE SEARCHES 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Dalia vs. United States (1979) 441 U.S. 236 ..... 2, 5, 6

Ford Motor Company vs. Mathis (5th Cir. 1963) 322 F.2d 267 4

Hobart vs. Sohio (N. D. Miss. 1966) 255 F.Supp. 972 4

Johnson vs. United States (1948) 333 U.S. 10 8

Lichina vs. Futura (D. Colo. 1966) 260 F.Supp 252 4

People vs. Scott (1987) 21 Cal.3d 284 ..... 7, 8

Terry vs. A.P. Green (E. D. Ark. 1958) 164 F.Supp. 184 4

United States vs. Gervato (3d Cir. 1973) 474 F.2d 40, cert. denied, 414 U.S. 864 ..... 5, 8, 9

RULES:

Rule 17.1(c) of the Rules of the Supreme Court of the United States 2

CONSTITUTION:

Fourth Amendment of the United States Constitution 1, 2, 3, 6, 11

INTRODUCTION

Amicus curiae, Los Angeles Police Protective League, hereby supports the petition of Daryl Gates, et al., for a writ of certiorari to the Supreme Court of the State of California.

Petitioner seeks review of the decision of the Supreme Court of the State of California in the case of *Langford vs. Superior Court* (1987) 43 Cal.3d 21, which imposed drastic and unprecedented restrictions upon the manner in which law enforcement authorities may execute search warrants issued pursuant to the Fourth Amendment of the United States Constitution.

Consent of all parties to file this brief has been obtained and will be documented under separate cover. The Los Angeles Police Protective League is the recognized representative of sworn Los Angeles Police Officers. *Amicus* has a direct and substantial interest in the outcome of this litigation, since the decision of the California Supreme Court will adversely affect the safety of member officers who are regularly assigned to execute search warrants.

The decision will have an adverse impact upon the ability of law enforcement officers within the State of California such as member officers of *amicus,* Los Angeles Police Protective League, to fulfill their responsibility to protect the public from criminal activity and its attendant danger and nuisance.

The *Langford* decision, if allowed to stand, will place law enforcement at a tactical disadvantage in relation to the operations of organized crime and narcotics traffic, and may compel law enforcement to retreat in the face of the elaborate and sophisticated fortifications behind which

the hard core elements of illicit narcotics trade conduct their business. The decision, as it conflicts with applicable decisions of this Court, also raises a concern for certainty of the law and for uniformity of Constitutional interpretation.

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DISCUSSION

The petition should be granted on the basis of Rule 17.1(c) of the Rules of the Supreme Court of the United States (28 *United States Code*), which provides for a grant of certiorari "when a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." In *Langford vs. Superior Court* (1987) 43 Cal.3d 21, the California Supreme Court decided important questions of Fourth Amendment interpretation that have not been, and should be, settled by this Court. The decision conflicts with applicable decisions of this court, especially *Dalia vs. United States* (1979) 441 U.S. 236.

The controversy which produced the *Langford* decision arose when officers of the Los Angeles Police Department used a motorized battering ram to execute a search for contraband at a fortified residence popularly known as a "rock house." The Court granted a writ of mandate enjoining the future use of the battering ram "unless authorized in advance by a neutral magistrate, and unless exigent circumstances develop at the time of entry." 43 Cal.3d at 29. The injunction was based upon the rationale that the battering ram is "inherently dangerous." 43 Cal.3d at 24.

The case presents the general question as to the extent to which the Fourth Amendment restricts the means by which law enforcement officers may execute an otherwise lawful search. The case also raises the issue whether prospective relief is available under the Fourth Amendment against a particular means of executing a search warrant or whether the remedy for such a search is more appropriately limited to damages.

Since the California Supreme Court may have ruled incorrectly on an important issue arising under the U.S. Constitution, and since this ruling conflicts with applicable decisions of this Court, the petition for writ of certiorari should be granted.

1. THE RULE REQUIRING JUDICIAL APPROVAL OF USE IN EXECUTING A SEARCH WARRANT OF INSTRUMENTALITIES DEEMED INHERENTLY DANGEROUS WILL HAVE AN ADVERSE EFFECT UPON LAW ENFORCEMENT

In the *Langford* decision, the California Supreme Court refused to restrict the use of pyrotechnic explosive devices known as "flash-bangs" in executing search warrants. The court stated that "since we are not convinced that the flash bangs are inherently dangerous, we rely on the discretion of law enforcement agencies to determine when and under what circumstances they are to be used." 43 Cal.3d at 24. Consequently, the decision to enjoin the battering ram was predicated upon a conclusion that the battering ram is "inherently dangerous."

The term "inherently dangerous" has been applied in tort law to a wide variety of devices and instruments,

some of which are indeed quite ordinary. The term is more inclusive that the category of "ultrahazardous activities" which are subject to strict liability. Many standard instruments used in police work fall within the "inherently dangerous" category.

The term "inherently dangerous" has been used to describe such unremarkable instrumentalities as a ski chair lift (*Lichina vs. Futura* (D. Colo. 1966) 260 F.Supp. 252); or crude oil with a hydrogen sulfide content (*Hobart vs. Sohio* (N. D. Miss. 1966) 255 F.Supp. 972); or to the activity of unloading dump trucks (*Terry vs. A.P. Green* (E. D. Ark. 1958) 164 F.Supp. 184). In *Ford Motor Company vs. Mathis* (5th Cir. 1963) 322 F.2d 267, the term "inherently dangerous" was applied to an automobile with defective lights, based on its capacity to "plunge the driver in total, sudden, unpredicted darkness." 32 F.2d at 275. By conditioning the use of an instrumentality deemed inherently dangerous upon prior judicial approval, the *Langford* decision would require police to notify a magistrate if they contemplate driving to a search location with lights off. This hypothetical consideration illustrates the extent to which the *Langford* decision could be used to intrude upon traditional matters of proper police discretion. The ruling would invite magistrates to oversee the deliberation of law enforcement authorities on a broad variety of tactical decisions.

No precedent exists for the introduction into Fourth Amendment analysis of a standard of "inherently dangerous" instrumentalities in assessing the reasonableness of a search. This standard, derived from product liability actions between merchants and consumers, is inapplicable to encounters between law enforcement and criminal suspects.

Accordingly, the *Langford* decision should be reviewed by this Court to determine whether the state court has interpreted the Constitution in a manner in conflict with applicable decisions.

2. THE CALIFORNIA SUPREME COURT INTERPRETED THE FOURTH AMENDMENT IN A MANNER WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The California Supreme Court distinguished the present action from the case of *Dalia vs. United States* (1978) 441 U.S. 238, which held that a search warrant permitting electronic eavesdropping implicitly authorizes covert entry to install the device.

The *Langford* decision purports to distinguish *Dalia* on its facts. To carry out this analysis, the Court in *Langford* necessarily concluded that the *Dalia* decision was based upon the implicit authority for covert entry derived from the fact that such entry is necessary in virtually every wiretap, and that fact that "covert entry involves minimal destruction of property and danger to persons." 43 Cal.3d at 30. If these distinctions prove to be illusory, *Langford* was simply decided in conflict with *Dalia*.

The authority for covert entry implicit in the judicial approval of a wiretap furnishes no distinction, since authority for forced entry is implicit in a warrant for a house search. The *Dalia* opinion affirms this proposition by reference to this Court's denial of certiorari in *United States vs. Gervato* (3d Cir. 1973) 474 F.2d 40, cert. denied, 414 U.S. 864, cited in *Dalia* at 441 U.S. 258, footnote 19. In *Gervato*, forcible entry of a house to execute a search

warrant for drugs was upheld even in the absence of exigent circumstances. Reversing the trial court ruling that the search was "unreasonable because of the possibility of unnecessary property damage," the court stated that "we do not believe that this alone is a sufficient detriment to make a search unreasonable where a warrant based on probable cause has been obtained." 474 F.2d at 45. Commenting on this case, the *Dalia* opinion rejects the idea that "officers requesting a warrant would be constitutionally required to set forth the anticipated means for execution even in those cases where they know beforehand that unannounced or forced entry likely will be necessary." 441 U.S. at 258, footnote 19. Contrary to the interpretation of the California Court, the *Dalia* decision suggests that authority for forced entry to execute a house search is equally implicit in the issuance of a warrant as is covert entry for the installation of a wiretap.

The distinction drawn by the *Langford* court based on property damage and personal injury also evaporates in the face of the previously cited language from the *Gervato* opinion. The holding in *Dalia* is not based upon a finding of minimal destruction and danger, as suggested by the California Court, rather the *Dalia* decision recognized that "it is generally left to discretion of the executing officer to determine the details of how best to proceed with the performance of a search authorized by warrant." 441 U.S. at 258.

Since neither distinction drawn by the *Langford* court withstands analysis, the California Court decided *Langford* in conflict with an applicable decision of this court. The *Langford* decision departs from the clear standard articulated in the *Dalia* opinion, that the Fourth Amend-

ment requires only a neutral magistrate, probable cause, and particularity (441 U.S. at 256), and that "nothing in the language of the Constitution or in this court's decisions . . . suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed." 441 U.S. at 258. By imposing additional, unwritten requirements upon the search warrant process, the California court has needlessly introduced uncertainty and complexity into the field of Constitutional interpretation. By placing tactical law enforcement decisions in the hands of judicial authorities, the *Langford* decision deprives officers in the field of the flexibility necessary to respond to changing circumstances, and impairs the ability of law enforcement authorities to protect the public from the operations of sophisticated criminal enterprises in their midst.

3. THE LANGFORD DECISION IMPROPERLY EQUATES CONSTITUTIONAL PRINCIPLES GOVERNING PERSONAL SEARCHES TO THOSE GOVERNING HOUSE SEARCHES

The *Langford* decision improperly applies to house searches a set of Constitutional principles evolved for the purpose of adjudicating the reasonableness of certain personal searches. To guide the magistrate's consideration of the ram, the *Langford* court applied a balancing test (43 Cal.3d at 31) previously articulated in *People vs. Scott* (1978) 21 Cal.3d 284, in a challenge to a court ordered test of the genitals of a suspected child molester. The justification for the additional balancing test required in *Scott* depended upon "the Fourth Amendment's particular solici-

tude for 'personal dignity and privacy.' " 21 Cal.3d at 293.

The court in *Scott* observed that "Circumstances which permit penetration beyond the body's surface are particularly limited, since such intrusions may readily offend those principles of dignity and privacy which are protected by the Fourth Amendment." Accordingly, the court ruled that "the more intense, unusual, prolonged, uncomfortable, unsafe or undignified the procedure contemplated, or the more it intrudes upon the essential standards of privacy, the greater must be the showing for the procedure's necessity." 21 Cal.3d at 294.

No precedent mandates the application to house searches of the factors that influenced the *Scott* decision. The *Langford* court relies upon *Johnson vs. United States* (1948) 333 U.S. 10 for the proposition that "Evaluation of unusual or dangerous intrusions . . . should not be left exclusively to" police. 43 Cal.3d at 29. However, the *Johnson* case involved only the existence of probable cause, not the means of executing a search after probable cause is shown. There is simply no authority to apply the factors considered in *Scott* beyond the scope of an intrusive personal search.

The *Scott* court required an additional balancing test for intrusive body searches because "in some cases, an intrusion will not be justified even where there is probable cause . . ." 21 Cal.3d at 294-295. Contrary to *Gervato* and other cases upholding forcible entry, the *Langford* decision extends the *Scott* rationale to house searches, on the basis that "although searches of rock houses are directed against residences and not persons, the risk of

incidental injury to human beings is reasonably foreseeable." 43 Cal.3d at 29.

The *Langford* decision means that a house search may not be justified where probable cause exists if the risk of incidental injury is reasonably foreseeable. Under the circumstances of the *Langford* case, was it the battering ram that created the risk of incidental injury? Faced with a fortified house, police executing a search warrant were confronted with the possibility of being captured in a cage, where they could be at the mercy of heavily armed suspects. The ram only shifted some of the danger of injury from the police to the suspect.

Gervato and its progeny establish that a suspect may not defeat a search warrant by locking the door and refusing admittance. *Langford* now says in effect, that a suspect may defeat the purpose of a warrant by creating conditions that make it impossible to enter safely without using a device such as the ram. The *Langford* case thus recognizes that the fortifications of a rock house create a legitimate expectation of privacy!

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CONCLUSION

Amicus finds the *Langford* decision particularly ominous because the battle of wits between law enforcement and the criminal element is subject to constant change and escalation. Today's decision on the battering ram will provide the controlling principles for issues of law enforcement in the future, whatever form these issues may take. Yet the *Langford* decision leaves these principles in doubt.

For example, although decisions of this Court indicate that the authority to make a forced entry is implicit in a warrant for a house search, the *Langford* decision makes an exception when the entry is to be made by a "powerful armed vehicle." 43 Cal.3d at 30. How broad is this exception? The only guidance given by the Court is the standard of inherent danger, which has been shown to be unacceptably broad.

Without establishing a principled basis for this newly imposed Constitutional requirement, the *Langford* court has also ruled that the reasonableness of a law enforcement device may be adjudicated in advance of its use. Seizing upon a finding that "the risk of incidental injury is reasonably foreseeable," (43 Cal.3d at 29) the Court has enjoined the use of a device before this device has ever caused a personal injury. How broad is this newly formed judicial power to enjoin the use of law enforcement equipment? The only test suggested by the Court is whether incidental injury is reasonably foreseeable, a test which may become unmanageably vague when applied prospectively. This test is also subject to abuse, as the risk of incidental injury may be created or enhanced by the suspects themselves to defeat the objectives of law enforcement.

Accordingly, *amicus* joins in petitioning for review of the *Langford* decision, to determine whether the Fourth Amendment restricts the means to execution of a house search, and whether the use of a particular device for executing a house search may be enjoined prospectively.

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Respectfully submitted,

STONE & HEALY
/s/ MICHAEL P. STONE
3435 Wilshire Boulevard
24th Floor
Los Angeles, California 90010

Counsel for *Amicus Curiae*,
LOS ANGELES POLICE
PROTECTIVE LEAGUE
(213) 382-5444